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IN

TRANSCRIPT OF REC

SUPREME COURT OF THE UNITED STATES.

No. ~~353.~~ 123

THE KENTUCKY IMPROVEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 31, 1877.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the Kentucky Improvement Company, a corporation established under the laws of the State of Kentucky and having its usual place of business in Boston, in the State of Massachusetts, plaintiff, and Charles W. Slack, of said Boston, collector of internal revenue of the United States, third collection district of Massachusetts, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiff, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1876, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

JOHN LOWELL,
District Judge.

Sufficient service of this writ of error and of a citation thereunder is hereby acknowledged.

GEORGE P. SANGER,
U. S. Att'y for Def't in Error.

2 Circuit court of the United States, district of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of October, A. D. 1876.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-six.

Before the Honorable Nathan Clifford, associate justice.

THE KENTUCKY IMPROVEMENT COMPANY, A corporation established under the laws of the State of Kentucky, having its usual place of business in Boston, in the district of Massachusetts, plaintiff,

v.

CHARLES W. SLACK, OF SAID BOSTON, COLLECTOR of United States internal revenue, third collection district of Massachusetts, defendant.

4 In an action of contract.

And the plaintiffs say the defendant owes them eight hundred eighty-eight dollars ($888), according to the account annexed, to the damage of the said plaintiff, as it says, the sum of fifteen hundred dollars.

BILL OF PARTICULARS.

BOSTON, *June* 17, 1873.

Charles W. Slack, esquire, collector U. S. internal revenue, 3rd collection dist. of Mass., to Kentucky Improvement Co., Dr.

1. To amount of internal revenue taxes on coupons erroneously and illegally assessed and collected May 24, 1870	750
2. To interest on same to date	138
	888

The writ in this cause is dated the seventeenth day of June, A. D. 1873, and is made returnable before the justices of the superior court of the commonwealth of Massachusetts then next to be holden at Boston, within and for the county of Suffolk, on the first Tuesday of July, A. D. 1873.

This cause was removed from said superior court to this circuit
5 court by writ of certiorari dated the ninth day of July, A. D. 1873, and made returnable before this circuit court on the fifteenth day of October, A. D. 1873. This cause was duly entered here at the May term of this court, A. D. 1873, and was thence continued to the October term, A. D. 1873, when due return was made of said writ of certiorari, and the parties appeared by their respective attorneys. This cause was thence continued from term to term to the October term, A. D. 1875, when, on the twenty-fourth day of January, A. D. 1876, the following statement of "agreed facts" was filed, namely:

The suit is brought after appeal duly made (April 29, 1873) to the Commissioner of Internal Revenue to recover an internal-revenue tax of seven hundred and fifty dollars, paid to said collector on the 24th

day of May, 1870. The tax was a tax of 5 %, assessed upon coupons to the amount of $15,000, payable February 15, 1870, on bonds of said company to the amount of $500,000, dated August 15th, 1866, and bearing interest at the rate of 6 per cent., payable semi-annually.

The Kentucky Improvement Company was originally organized
6 under an act of the general assembly of the Commonwealth of Kentucky, approved March 4, 1865, by the name of the "Argilite Mining and Manufacturing Company," which act provided as follows:

"§ 2. The objects and purposes of the incorporation of said company shall be the mining for coal, iron ore, petroleum, carbon, or rock oil, and any and all other minerals or mineral substances, or the direct products of the earth, or any or all of them, and the manufacture and refining of any or all of them, and transportation to market of the same; the location and field of mining and manufacture of said company shall be in Greenup, or any of its adjoining counties.

"§ 7. Said company shall have the power, and may, if they choose so to do, lock and dam Little Sandy River up to their mines and property: Provided, for the condemnation of lands and property for said purpose the proceedings shall be had as is now provided by law for the condemnation of mill sites.

"§ 8. Said company shall have the power to take, acquire, and hold such lands, mines, and mining rights as they may deem necessary for the uses of said company, and all such personal property, ma-
7 chinery, boats, flats, etc., as may be necessary, and to dispose of, for the use of the company and the stockholders, any or all of the same."

It was enacted by an act of the said general assembly, approved December 14, as follows:

"SECTION 1. That the name of the 'Argilite Mining and Manufacturing Company' is hereby changed, and said corporation shall hereafter be known and styled the 'Kentucky Improvement Company.'

"§ 4. The said corporation is hereby authorized to construct one or more rail tracks from any lands owned or improved by said corporation to convenient points on the Ohio or Little Sandy River, or both, or to connect with other railways, and to maintain said track or tracks and to draw cars over the same by suitable motive power. The company is hereby authorized to condemn and appropriate such lands and materials as may be necessary for the construction and convenient and proper use and maintainance of such railroads: Provided, that for the con
demnation of the lands and materials for such purpose, the same
8 proceedings shall be had as are now required by law for the condemnation of lands and materials for turnpikes and plank roads: Provided, further, that the land condemned for any railroad track shall not exceed in width one hundred feet.

"§ 5. That in order to carry out to the fullest extent the purposes and objects of said act of incorporation, the said company is authorized to sell all minerals, mineral substances, products of the earth, and all other articles of commerce and manufacture lawfully possessed by them, and to buy and sell all such articles of merchandise as may be required to carry out the objects of their charter, and to establish agencies in any part of the United States, for the prosecution of the traffic hereby authorized.

"§ 6. That should said company lock and dam the Little Sandy River, they shall build two bridges over said river sufficient for the public travel, one of the bridges to be at the crossing of the Greenupsburg and

Raccoon Furnace Road, and the other at the crossing of the Greenupsburg and Grayson Road, at or near the Argilite Mills."

9 The Kentucky Improvement Company was duly organized under the acts aforesaid and commenced and continued operations thereunder until it ceased to exist, about March 1, 1870.

At an adjourned meeting of the shareholders of said company, held on the 24th of July, 1866, it was resolved:

"1st. To authorize the building of a railroad and to provide locomotives, cars, and other facilities for the transportation of coal and other productions to market from the canal openings near Hunnewell Furnace to Hockaday's Landing, on the Ohio River.

"2d. That a sum not exceeding $500,000 be raised for the purpose of building and equipping said railroad, and afford facilities for transportation to market for the mineral and other productions of the company's property.

"3d. That the president and board of directors of this company be, and they hereby are, authorized and empowered to issue bonds to the amount of $500,000 * * * secured by an indenture of mortgage on all their present landed property and improvements * * * bearing six per cent. interest, the interest payable semi-annually."

In pursuance of the above vote, an issue of bonds was made to

10 the amount and bearing the interest named, and of date August 15, 1866, and was secured by a mortgage to trustees of even date of the then landed property and improvements of said company, and the coupons taxed in this case were a part of the coupons attached thereto.

The whole issue was duly subscribed for and delivered to the subscribers. The road was finished and opened for the business of the company about the first of June, 1868.

In addition to its own freight and its own officers and servants, the plaintiff company transported over its road from time to time for hire other passengers and freight, the aggregate amount of the receipts from which for one year and eight months are shown in the accompanying table; but there was no provision in its charter in terms authorizing it to convey freight or passengers other than its own. Another table appended gives the company's general business from April, 1866, to Feb. 15, 1870. It is not known, and for the purposes of this hearing it is not claimed, that the plaintiff company, during the period ending February, 15, 1870, ever refused to carry for hire such passengers and freight other than their own, as offered.

F. W. PALFREY,
For Plaintiff.
GEORGE P. SANGER,
(For Def't) U. S. Att'y.

	OTHER THAN COMPANY.		Company's iron freight.
	Passenger receipts.	Freight receipts.	
11 1868.			
July	68 50	96 40	815 95
Aug.	133 75	63 13	1,183 22
Sept'r	220 20	20 00	1,075 22
Oct	165 00	44 35	1,461 30
Nov'r	170 50	5 25	1,586 93
Dec'r	322 50	107 77	1,356 60
Jan'y	218 75	112 43	1,666 60
Feb'ry	222 50	132 30	1,680 08
March	403 25	119 55	1,958 73
April	224 00	104 35	1,842 57
May	249 50	78 80	2,339 88
June	219 10	47 45	2,347 00
July	272 50	87 57	1,378 51
Aug.	328 90	510 60	1,605 14
Sept	413 20	116 82	1,017 27
Oct	214 90	473 11	991 05
Nov'r	262 20	503 52	1,380 21
Dec'r	351 05	797 66	1,648 70
1870.			
Jan	278 50	332 30	1,569 84
Feb. 1-15	130 00	80 00	805 00
	$4,868 80	$3,833 36	$29,709 80

The company's sales of coal were as follows:

12	1866, Apr. 1 to Dec. 31		$774 71
	1867 Jan 1 " " "		324 33
1868,	" " " " "		25,576 82
1869,	" " " " "		40,909 01
1870,	" " " Feb. 15		6,541 55
			$74,126 42

And the company produced for its own use during same period as follows:

1866	356.16 tons
1867	5,433.55 "
1868	2,286.78 "
1869	792 "
1870	60 "

And the company's sales of iron were:

1866, April 1 to Dec. 31		$49,071 16
1867, Jan. 1 " " "		95,846 46
1868, " " " " "		161,735 46
1869, " " " " "		145,812 15
1870, " " " Feb. 15		18,204 13
		470,669 36

And the company's sales at its stores on the ground during same period amounted to $506,529 75

13 This cause thereupon came on to be heard by the court, the honorable Daniel Clark, district judge of the United States for the district of New Hampshire, duly assigned to hold said circuit court by the honorable George F. Shepley, circuit judge, sitting and holding said court, and was fully argued by the counsel for the respective parties.

This cause was thence continued to this present term, when, on the twenty-first day of July, A. D. 1876, the opinion of the honorable Daniel Clark, district judge as aforesaid, that the defendant is entitled to judgment for his costs, is filed; and thereupon, to wit, July 21st, A. D. 1876, it is considered by the court, the honorable John Lowell, district judge, sitting, that the said Kentucky Improvement Company take nothing by its said writ, and that the said Charles W. Slack, defendant, recover of the said Kentucky Improvement Company, plaintiffs, his costs of suit, taxed at twenty-seven dollars and ninety-three cents.

14 A true record.
Attest: JOHN G. STETSON, *Clerk.*

The following is a copy of the opinion of court in this cause, in accordance with which judgment was entered for the defendant:

Opinion.

THE KENTUCKY IMPROVEMENT CO.
v.
CHARLES W. SLACK.

CLARK, J.:

The question is, whether the Kentucky Improvement Co. was a railroad co., so as to be liable to the tax imposed. At the hearing I was at first under the impression that it was not, and that the construction & use of its railroad was only incidental and subsidiary to its other objects, and designed to take the place of locking and damming the Little
15 Sandy River, as provided in its first charter, under the name of the "Argilite Mining and Manufacturing Company." But on further examination & reflection I am satisfied that such impression was not correct.

1st. Because the power to build a railroad, "or one or more rail tracks, from any lands owned or improved by said corporation, to convenient points on the Ohio or Little Sandy River, or both, or to connect with other railways, and to maintain said tracks and draw cars over the same by suitable motive powers," is a very much more extensive grant than the power to "lock and dam the Little Sandy" up to their mines and property.

Under the amended charter a Briareau railroad company might have been built up. It might have netted the State of Kentucky all over with tracks from the mouth of the Ohio to its source, and all along the Little Sandy, and to every other railroad in the State, and at any
16 convenient point. It could build a road from any land owned or improved by it to any of these points in every direction convenient, & condemn the lands taken by it.

It is doubtful if any other charter of such extensive powers to a railroad company can anywhere be found.

2nd. Because said company, after building their road, used it, not only to convey their own products and manufactures, but as a public road for freight & passengers. It is true, the amount thus received was not large; but the company accommodated "all comers."

It is contended there was no provision in the charter in terms authorizing the company to convey freight or passengers other than its own. But the power to build a road must be construed as a power to use it, when built, in a legitimate way, for such is the object and pur-

pose of building a road; and there is nothing in the charter re-
17 stricting the road to carrying its own passengers and freight.

Again, the company having carried freight and passengers other than their own, cannot now be heard to say they had no right to do so. They have by their acts put a construction upon the extent of their grant.

3d. Because it is not certain that the grant to build a railroad or railroads was in lieu of the power "to lock and dam the Little Sandy River," but was in addition to it.

The amended charter provides "that should said company lock and dam the Little Sandy River, they shall build two bridges," &c.; showing pretty conclusively that both powers—to build a railroad or railroads, and to lock and dam the Little Sandy River—were included in the charter.

I think, therefore, that the Kentucky Improvement Company was a railroad company within the purview of the statute, and liable to the taxed assessed.

There must be judgment for the defendant, and for his costs.

18 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of The Kentucky Improvement Company v. Charles W. Slack in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.] JOHN G. STETSON, *Clerk.*

19 *Bond on writ of error.*

Know all men by these presents that we, The Kentucky Improvement Company, a corporation established under the laws of the State of Kentucky, having its usual place of business in Boston, in the State of Massachusetts, as principal, and Nathaniel Thayer and John Thomas, both of said Boston, as sureties, are held and firmly bound unto Charles W. Slack, of said Boston, collector of United States internal revenue, third collection district of Massachusetts, in the full and just sum of three hundred dollars, to be paid to the said Charles W. Slack, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately at a circuit court of the United States, within and for the district of Massachusetts, in a suit depending in said court between said Kentucky Improvement Company, plaintiff, and said Charles W. Slack, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing him to be and appear at a Supreme Court of the United

States to be holden at Washington, on the second Monday of October, A. D. 1876:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

KENTUCKY IMPROVEMENT CO.,
By R. SULLIVAN, *Treasurer.* [L. S.]
N. THAYER. [L. S.]
JOHN THOMAS. [L. S.]

Signed, sealed, and delivered in presence of—

Approved.

JOHN LOWELL,
District Judge.

Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest.

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

(Indorsement on cover:) No. 353. The Kentucky Improvement Company, plaintiff in error, vs. Charles W. Slack, collector of internal revenue. Massachusetts C. C. U. S. Filed 31st March, 1877.

Supreme Court of the United States.

— No. 123. —

THE

KENTUCKY IMPROVEMENT CO.

Plaintiff in Error,

VS.

CHARLES W. SLACK,

COLLECTOR OF INTERNAL REVENUE.

BRIEF FOR THE PLAINTIFF IN ERROR.

BOSTON:

PRINTED BY T. W. RIPLEY, 138 CONGRESS STREET.

1879.

Supreme Court of the United States.

October Term, 1879. — No. 123.

The Kentucky Improvement Company, Plaintiff in Error,

vs.

Charles W. Slack, Collector of Internal Revenue.

In Error to the Circuit Court of the United States for the District of Massachusetts.

BRIEF FOR THE PLAINTIFF IN ERROR.

The Kentucky Improvement Company seeks in this cause to recover the amount of certain Internal Revenue taxes on coupons, alleged to have been erroneously and illegally assessed and collected.

The question for discussion is simply this: Was the Kentucky Improvement Company, at the time the tax in question was imposed, a railroad company indebted for any money for which bonds had been issued, payable in one or more years after date, upon which interest was stipulated to be paid, or coupons representing the interest, and if it was, was it specially exempted from the tax imposed?

The case stated finds that the Plaintiff Company was organized under an Act of the General Assembly of the Commonwealth of Kentucky, approved March 4, 1865, and an Act emendatory of the former, approved December 14, 1865; that by the second section of the former Act, "the objects and purposes of the incorporation of said Company" are declared to be "the mining for coal, iron ore, petroleum, carbon, or rock oil, and any and all other minerals or mineral substances, or the direct products of the earth, or any or all of them, and the manufacture and refining of any or all of them, and transportation to market of the same;"—

That by the fifth section of the latter Act it was authorized, "in order to carry out to the fullest extent the purposes and objects of said

Act of incorporation, to sell all minerals, mineral substances, products of the earth, and all other articles of commerce and manufacture lawfully possessed by them, and to buy and sell all such articles of merchandise as might be required to carry out the objects of their charter;"— that under these Acts, it did a business in the period from April 1, 1866, to February 15, 1870, *i. e.*, three years, ten months, and fourteen days, of the following amount; —

Sales of coal - - - - - - -	$74,126.42
" " iron - - - - - - -	470,669.36
" " sundries at stores - - -	506,529.75
	$1,051,325.53

besides producing for its own use about 8927 tons of coal, and making no account of iron and coal intended for sale and not yet sold; —

That the location and field of mining and manufacture of said Company were to be in Greenup or any of its adjoining counties, and that they were authorized to establish agencies in any part of the United States for the prosecution of the traffic authorized by the acts of incorporation; —

That the fourth section of the emendatory Act of December 14, 1865, authorized the Plaintiff Company "to construct one or more rail tracks from any lands owned or improved by said Corporation to convenient points on the Ohio or Little Sandy River, or both, or to connect with other railways, and to maintain said track or tracks, and to draw cars over the same by suitable motive power;" —

That the stockholders voted, July 24, 1866,—

1. To authorize the building of a railroad and to provide locomotives, cars, and other facilities for the transportation of coal and other productions to market from the canal openings near Hunnewell Furnace to Hockaday's Landing on the Ohio River.

2. That a sum not exceeding $500,000 be raised for the purpose of building and equipping said railroad, and afford facilities for transportation to market for the mineral and other productions of the Company's property.

3. That the president and board of directors be authorized to issue bonds to the amount of $500,000, secured by a mortgage on all their present landed property and improvements.

That in pursuance of the above vote, an issue of bonds to the amount named was made, of date August 15, 1866, and secured by a

mortgage to trustees of even date of the then landed property and improvements of the Company; —

That the whole issue was duly subscribed for and delivered to the subscribers; —

That the road was finished and opened for the business of the Company about June 1, 1868, and that the Company ceased to exist about March 1, 1870; —

That in addition to its own freight and its own officers and servants, the Plaintiff Company transported over its road, from time to time, for hire, such other passengers and freight as offered, to the aggregate amount of $8,702.16, for the last twenty of the twenty-one months during which the Company possessed the road, no payments for other than its own business during the first month of the existence of the road being shown to have been received; —

That there was no provision in the Acts of incorporation in terms authorizing the Company to carry freight or passengers other than its own; —

That the coupons taxed in this case were coupons attached to the bonds above-mentioned, and payable Feb. 15, 1870.

That this suit was brought after appeal duly made to the Commissioner of Internal Revenue.

The assignment of errors is as follows: That the Court below erred in finding that there must be judgment for the defendant below, the defendant in error here, — and, more particularly, that it erred in finding that upon the "agreed facts" filed (Record pp. 2 *et seq.*), the plaintiff in error was a railroad company, so as to be liable to the tax imposed (*i. e*, by s. 9 of ch. 184 of the Act of July 13, 1866, XIV St. 138), and was not protected by the proviso found on p. 139 of the volume last cited.

Thus it appears that the Plaintiff Company was organized under two Acts, of which the former in terms incorporated a "mining and manufacturing company," and the latter changed its name to "The Kentucky Improvement Company;" while its objects and purposes were to mine and prepare for market and transport to market the "direct products of the earth," that is to say, minerals and mineral substances generally, and that it had no other objects and purposes; that its "location and field of mining and manufacture" were in a limited district of eastern Kentucky, comprising at the outside four counties of which a great part was a wild and almost virgin country. An examination of the legislation will show that this tax was imposed under the provisions of s. 9 of ch. 184 of the Acts of July 13, 1866,

XIV St. 138, — the last act imposing a tax upon the coupons of bonds issued by Railroad Companies, &c.

The coupons taxed by this Act are those attached to bonds issued by railroad, canal, turnpike, canal navigation, and slack-water companies.

It will not be contended that the Plaintiff Company was any one of these, unless it was a railroad company, and the question for discussion is therefore precisely that stated at the commencement of this brief.

A careful examination of the series of Internal Revenue Laws leads to the conclusion that it was the general intention of Congress to impose the burden of Internal Revenue taxation upon established industries and accumulated capital, and to leave infant enterprises free of the load. Where there was wealth there was taxation, but where men were busy in bringing hidden wealth to light, their processes were not taxed. Thus the Act of July 1, 1862, ch. 119, XII Stat. 469, taxed the interest, coupons, and dividends paid by railroad companies, and all dividends in scrip or money and all sums added to their surplus or contingent funds by Banks, Trust Companies, Savings Institutions, and Insurance Companies. The Act of June 30, 1864, ch. 173, XIII St. 283, added to the list, and taxed interest, coupons, dividends, profits carried to the account of any fund or used for construction, of railroad, canal, turnpike, canal navigation, and slack-water companies. The Act of July 13, 1866, was similar, except that it extended the taxation to the coupons, &c., paid to non-residents, whether citizens or aliens.

Nowhere does there appear any tax imposed upon the interest, coupons, dividends, profits, &c., of mining companies.

The distinction I take to be this: While a miner or the manufacturer of the products of mining was subjected to the tax imposed by the general provisions taxing manufactured articles when sold or removed for sale, the processes by which he reached a position in which he could mine, were left free.

In a country like ours, full of hidden wealth, it was natural that such favor should be shown.

The disposition to encourage young and struggling industries is shown in many places. Thus by the 10th section of the Act of July 13, 1866, very many of the direct (or nearly direct) products of the earth, as alum, building-stone, copper, lead, tin, coal, pig-iron, slate, saltpetre, sulphur, and zinc, are exempted. By the Act of March 13, 1865, XIII St. 478, vehicles used to transport silver ores are exempt. Moreover, the Act of July 13, 1866, XIV St. 135, seems to exempt

from taxation the gross receipts of canals the water of which is used for mining purposes.

It thus appears that Congress did not impose a tax on coupons, interest, dividends, &c., paid by mining companies and companies engaged in manufacturing the proceeds of mining, and, more than that, that it was the general intent of Congress to foster such companies by exempting them from such taxation. Such exemption increased their capacity of borrowing, and facility of borrowing increased the probability of their bringing to light the hidden treasures of the earth.

But it must be conceded that if the Plaintiff Company was a railroad company indebted within the terms of the Act, it was taxable for the coupons and interest paid by it on the loans it effected, unless specially exempted.

It is submitted that it was not a railroad company, but a mining company owning a railroad for its own special uses.

What sort of a company it was meant to be, is shown by the acts of incorporation.

What sort of a company it was, is shown by its history. What a railroad is, is to be learned from the lexicons and the text-books.

a. It was incorporated to mine for coal and all other minerals or mineral substances, to manufacture and refine the same, and transport the same to market, and to sell all these and all other articles of commerce and manufacture lawfully possessed by it, and it was authorized to lock and dam Little Sandy River up to its property, and to construct one or more rail tracks from any lands owned or improved by it, and to maintain said track or tracks, and to draw cars over the same by suitable motive power.

b. Whether it be true or not that these acts authorized it to become a railroad company as well as a mining and manufacturing company, it is certain that it did not. The stockholders voted "to authorize the building of a railroad and to provide locomotives, cars, and other facilities for the transportation of coal and other productions to market . . . ,"—"that a sum . . . be raised for the purpose of building and equipping said railroad, and afford facilities for transportation to market for the mineral and other productions of the Company's property." Under this vote the railroad was built, and it appears that it was used very largely for bringing in its stores for sales on the ground, and for carrying out the coal it mined and the iron it made, while it was used to a very trifling amount for the convenience of the public.

The primary object of a railroad company is commerce and transportation.

Railroad Co. *vs.* Peniston, 18 Wall. 49.

Railroad companies are carriers for hire.

C. B. and Q. R. R. Co. *vs.* Iowa, 94 U. S. 155.

A corporation created by statute can exercise no powers and has no rights, except such as are expressly given or necessarily implied.

Huntington *vs.* Savings Bank, 96 U. S. 388.

"Express power is invariably given (if intended to be conferred) to the railroad company to equip its road, *and to transport goods and passengers thereon and charge transportation therefor.* This practice evidently springs from the conviction that a railroad company is not necessarily a transportation company, and that, to make it such, express authority must be given for that purpose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication."

Lake Superior & Miss. R. R. Co. *vs.* U. S., 93 U. S. 442.

In this case there is no indication that the convenience of the public was considered, — there is not a word said in the charter about general commerce, general transportation, rates of toll, rates of fare, no mention of common carriers, no mention of depots or stations. On the contrary, the whole of the charter provisions point to the construction and use of a track or tracks for the special business of the Company. The Legislature of Kentucky contemplated the creation not of a railroad company, but of a mining and manufacturing company with permission to construct and use a set of tracks for its own special purposes; and the action of the Company was in accordance with the grant.

But if it be urged that even if the Acts of Kentucky and if the Kentucky Improvement Company did not contemplate the creation of a railroad company, yet that the Kentucky Improvement Company did by its acts become a railroad company in the usual sense of the term, and having taken the profit, must bear the burden, we reply, that our action, such as it was, was forced upon us by the necessity of the case. It is common knowledge that a large part of the business of such companies in wild countries is the sale on its grounds to its employees of all sorts of supplies. To carry out our large production of coal and iron, and to bring in our stores, we must run trains, and it was practically impossible to refuse to carry such few passengers and parcels as offered. This being so, we had to charge something, or the population of that locality would have used their spare time in riding on our road. The government does not undertake to show that we ever advertised a single train, or held ourselves out to the public in any way as common carriers. We did very little as common carriers, and what little we did, we were obliged to do.

For these reasons, we submit that the plaintiff in error was not a railroad company within the meaning of the Act.

SECOND.

But if the Conrt shall be of opinion that the Plaintiff Company was a railroad company within the meaning of the Act, we submit that it was not "a railroad company indebted for any money for which bonds had been issued." This seems to be clear from the record, p. 4.

The Kentucky Improvement Company, while it was a mining and manufacturimg company and nothing else, voted "to authorize the building of a railroad . . . for the transportation of coal and other productions to market . . .

That a sum . . . be raised for the purpose of building and equipping said railroad, and afford facilities for transportation to market for the mineral and other productions of the Company's property; . . . . to issue bonds . . . secured by an Indenture of Mortgage on all their *present* landed property and improvements."

Upon this showing, it is submitted that, even if the Plaintiff Company shall be held to have *afterwards* become a railroad company, it could not, by such acts, become a railroad company indebted for money, &c., within the language of the Act.

Suppose the Company, instead of building the road it did build, had built a short track from one of its furnaces to another, and occasionally carried a passenger or parcel over such track for hire, could it be properly claimed that such action constituted it a railroad company, and subjected the coupons on its total bond issue to the Internal Revenue tax?

Or suppose that instead of issuing bonds to the amount of $500,000, it had issued bonds to the amount of a million, and used half the proceeds for opening mines and half for building a railroad, could it be properly claimed that it should pay the Internal Revenue tax on the coupons on its whole issue?

Nor will it do to say that, even if it was not a railway company, it might receive and pay the Internal Revenue tax as an agent of the Government to collect the income tax from its bondholders. That such tax was an income tax is settled by the cases of —

Haight *vs.* R. R. Co., 6 Wall. 15.
R. R. Co. *vs.* Jackson, 7 Wall. 262.
U. S. *vs.* R. R. Co., 17 Wall. 322.
Stockdale *vs.* Ins. Co., 20 Wall. 323.
R. R. Co. *vs.* Rose, 95 U. S. 78.

This Court said in the Stockdale case (see also Bailey *vs.* R. R. Co., 22 Wall, 604) that when a dividend is declared to any stockholder whose dividend is for any special reason exempt from tax, then the Corporation declaring the dividend is not liable.

Now the coupons taxed in this case were coupons payable in 1870. The whole annual amount of them was only $30,000. By the Act of March 2, 1867, s. 13, XIV St. 478, the income of individuals was exempt to the amount of $1000, and this Court will not say that the Government shall have the tax at any rate, when each bondholder may be entitled to the special exemption.

THIRD.

But if this Court shall be of opinion that the plaintiff in error was not only a railroad company, but a railroad company indebted, &c., within the language of the Act, then we submit that it was clearly protected against the tax by the proviso found on p. 139 of the Act of July 13, 1866, XIV St. 139. That proviso is as follows:

Provided, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, *that* in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness.

If this was a railroad company indebted, &c., its indebtedness bore interest at the rate of $30,000 per annum, while its gross receipts, *qua* railroad, were only $8,702.16 for twenty months, or, say, $5,221 per year. It will probably be conceded that no railroad's net receipts (taxes not deducted) are more than 50 per cent. of its gross. Upon this calculation, the annual net revenue of the Plaintiff Company, *qua* railroad, was only $2,610.50, while the interest on its indebtedness was $30,000. But, even if the gross receipts are regarded as net receipts, the inability of the railroad company to pay the interest on its indebtedness is manifest.

FRANCIS W. PALFREY,

For the Kentucky Improvement Company, Plaintiff in Error.

13 Exchange St., Boston, Mass.,
November 20, 1879.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE KENTUCKY IMPROVEMENT COMPANY
v.
CHARLES W. SLACK, COLLECTOR, &C. } No. 123.

BRIEF FOR THE DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE KENTUCKY IMPROVEMENT COMPANY
v.
CHARLES W. SLACK, COLLECTOR, &C. } No. 123.

BRIEF FOR THE DEFENDANT IN ERROR.

The facts are fairly stated in the brief for the plaintiffs in error.

The plaintiff in error was a corporation chartered in 1865 to mine coal, iron, and other minerals, and to transport them to market. For the purpose of effecting such transportation it was originally authorized to construct a slackwater navigation upon Little Sandy River; and afterwards, by an amendment to its charter passed during the first year of its existence, it was authorized to construct railroads to the Ohio or the Little Sandy or both, or to connect with other railways. In order to construct the slackwater navigation and the railways, it was invested with the power of condemning lands, &c.

In 1866 the company voted to raise $500,000 for the purpose of constructing the railway. This was done by issuing coupon bonds secured by a mortgage upon all of

its property. The road was completed in 1868, did a considerable business in the way of transporting coal for the company, and likewise a small business, amounting in twenty months to some $8,000, in carrying freight and passengers for the public. In the mean time the principal business of the company was mining, &c.

The tax in question was levied upon coupons of the bonds above mentioned, payable February 15, 1870.

The act of 1866, ch. 184, which is relied upon as justifying this tax, provided: "*That any railroad * * * company indebted for any money for which bonds and other evidences of indebtedness have been issued payable in one or more years after date upon which interest is stipulated to be paid or coupons representing the interest, * * * shall be subject to and pay an interest of five per centum on the amount of all such interest or coupons, * * * whenever and wherever the same may be payable, and to whatsoever party or persons the same may be payable, including nonresidents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons and dividends due and payable as aforesaid the tax of five per centum, &c., &c. Provided, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness.*" (14 Stat., 138.)

A principal question is, whether a corporation whose chief business is something to which a railroad is a convenient and, by its charter, allowed incident, does, in

constructing such railroad by means of bonds issued to raise money therefor, become a railroad company so far as to subject itself to the above statutory provision for raising revenue.

Something is said in the brief of the learned counsel as to the character of the business done by the railroad, viz, a business substantially *private;* but it seems that this observation is immaterial, because, 1. If the company held itself out for public patronage, the court will not enter into the question of *accounts* in order to discriminate between the business done by it in the one capacity and in the other; 2. If the company went on for twenty months to transact business for the public, it will be assumed that it did so rightfully, and a *quo warranto* cannot be incidentally suggested *by way of defending the company*, upon a proceeding of the present sort; and, 3. The circumstance that the company was clothed by its charter with the power of eminent domain for the purpose of constructing a railroad, implies that such road was to be subject to the use of the public.

It is submitted that the only reason why a distinction is drawn in the revenue acts of 1862, 1864, 1866, and 1870, between certain corporations which are, and others which are not, to be intermediaries between the United States and the ultimate tax-payers, *is a reason of administrative convenience*, viz, that the amount of the debts, &c., due from such companies being very large, and in general publicly known or easily ascertained, it was mainly on that account that they were to be charged as tax-debtors, and required to pay on behalf of their creditors and stockholders money which in the end came out of the pockets of the latter. Such is the account of

the matter given by Mr. Morrill whilst conducting the bill through the House of Representatives in 1862, and, so far as can be found by turning over the pages of the Globe, no other reason was suggested by anybody. (Globe, 1861–'62, Part 2, pp. 1196, 1291.)

Because thus convenient in general, the proceeding was made obligatory without exception upon all railroad companies. None of these could elect to throw the duty upon their creditors or shareholders. For all practical purposes they became themselves the tax-debtors and tax-payers.

Was the plaintiff in error such?

It is submitted that any company invested with railroad franchises and operating a railroad, which *in the same connection is indebted by bonds*, &c., is a railroad company within the terms of the above act.

That a company does other business seems not at all to affect the conclusion to be drawn from its being clothed with railroad franchises and actually doing railroad work. That a man did *banking business* to any extent made him liable to the appropriate tax, no matter that he was also and chiefly *a distiller* or a *tobacco manufacturer*.

A number of cases show that exemptions for certain reasons of railroad companies from taxes upon their property, do not extend to property held by them in another character than as railroad companies. (The Illinois Central *v.* Irwin, 72 Ill., 452; The State *v.* Hancock, 4 Vroom, 315; Worcester *v.* Western Railroad, 4 Metc., 564.)

It seems to follow that the liability for tax of a company, so far as it is a railroad company, is not at all affected by the relation to the revenue law of the property it may hold or debts it may owe in another capacity.

The law possesses faculties for making a proper discrimination in such a case. The question is, what bonds did the company issue *qua railroad company*, and what bonds did it not so issue.

Nor is it important that the bonds in question were issued before the railroad was constructed. For the company was already invested with railroad franchises and nascent railroad faculties of every sort.

It may be doubted whether under the words of the above act it makes any difference by whom the bonds were originally issued, so that they afterwards come to be due from a railroad company. The statute provides "that any railroad company *indebted* for any money for which bonds or other evidence of indebtedness have been *issued*"—without saying *by whom*. However, there seems to be no occasion for insisting here upon such a construction.

In respect to the point that the state of the accounts of this company for ordinary freight and passage money shows that it did not *qua railroad company* pay these coupons, it is submitted, 1, that if the interest be *in fact paid* by the company, it can make no difference under the above proviso where the money came from: In order to raise the question there must be not only inability, but also an actual failure: If there were a payment the presumption is absolute that every other circumstance existed that is necessary to constitute a tax-debt; and, 2, there seems to be no statement of accounts going to show what was the amount of pecuniary advantage derived by the company from their road; and it may well be that in taking such accounts the directors

felt themselves justified in crediting the company *qua railroad company* with other amounts than those so parsimoniously allowed upon page 5 of the record.

S. F. PHILLIPS,
Solicitor-General.